# Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG107 OF 1993/II
ABDUL KADIR SULAIMAN J
22 NOVEMBER 1995

***Bankruptcy*** *— Capacity of bankrupt — Competency to maintain an action — Cause of action accrued before commencement of bankruptcy — Whether bankrupt competent to maintain action for breach of contract without prior sanction of Official Assignee — Whether bankrupt competent to employ advocate and solicitor to act on his behalf without prior sanction of Official Assignee — Bankruptcy Act 1967 s 38(1)(a)*

***Bankruptcy*** *— Capacity of bankrupt — Removal of disqualification — Whether removal of incapacity would render bankrupt competent to maintain action commenced during bankruptcy — Bankruptcy Act 1967 s 36(2)*

***Civil Procedure*** *— Appeal — Appeal from registrar — Rehearing — Whether issue on point of law not raised before registrar can be raised — Rules of the High Court 1980 O 56*

The first plaintiff appealed against the decision of the deputy registrar in striking out his writ of summons issued against the defendant. The decision was made on the grounds that the first plaintiff being an undischarged bankrupt had no locus standi to commence and/or maintain an action for breach of contract in his name as he had not obtained the prior sanction of the Official Assignee to do so. However, before hearing the appeal, the defendant raised a preliminary objection on a point of law, on the ground that the first plaintiff was disabled from employing an advocate and solicitor to represent him in the action unless the prior sanction of the Official Assignee to do so was first obtained following s 38(1)(a) of the Bankruptcy Act 1967 ('the Act'). The plaintiff objected on the ground that this preliminary objection of the defendant was raised at such a late stage when it should have been made before the deputy registrar when hearing the application of the defendant at first instance. The plaintiff also pointed out that by a court order dated 9 January 1995, the receiving and adjudication orders made upon the first plaintiff in his bankruptcy were respectively rescinded and annulled so that, it was contended, he could now maintain the present action as his disqualification was now removed pursuant to s 36(2) of the Act.

**Held**, allowing the preliminary objection:

(1) From the pleadings, the cause of action involved an allegation of brach of contract by the defendant and accrued before the plaintiff's bankruptcy. Therefore, the cause of action vested on the Official Assignee upon adjudication. Hence, s 38(1)(a) of the Act applied to the plaintiff. In the circumstances, unless the prior sanction of the Official Assignee was obtained to maintain his

action, he was incompetent to do so in his own name. If so incompetent, he was also incompetent to employ an advocate and solicitor to act on his behalf without the prior sanction of the Official Assignee (see p 275D–F; *Re Khoo Kim Hock* [1974] 2 MLJ 29 followed; *Bailey v Thurston & Co Ltd* [1903] 1 KB 137 distinguished).

(2) Although the present proceedings was by way of appeal, but being an appeal pursuant to O 56 Rules of the High Court 1980, it was by way of a rehearing. The only limitation was as to the introduction of fresh evidence generally. Therefore, the preliminary objection, which was an issue on a point of law, could be raised at any time in the course of the proceedings (see p 275G–H).

(3) Section 36(2) of the Act concerns the removal of the disqualifications referred to in sub-s (1) and not generally. The removal of the incapacity of the first plaintiff by the court order of 9 January 1995 would not render competent his action commenced during the period of his incapacity and before the grant of the order by the court, without compliance with the provisions of s 38(1)(a) of the Act. Therefore, during this period of incapacity, the first plaintiff was incompetent to engage an advocate and solicitor to represent him (see pp 277H–I, 278D–E; *Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3 and *Ingall v Moran* [1944] KB 160 followed).

**[Bahasa Malaysia summary**

Plaintif pertama merayu terhadap keputusan timbalan pendaftar dalam membatalkan writ saman yang diisu terhadap defendan. Keputusan itu dibuat atas alasan bahawa plaintif pertama sebagai seorang bankrap yang tidak dilepaskan tidak mempunyai locus standi untuk memulakan dan/atau mengekalkan suatu tindakan untuk keingkaran kontrak dalam namanya kerana beliau tidak memperolehi kebenaran terlebih dahulu dari Pegawai Pemegang Harta untuk berbuat demikian. Walau bagaimanapun, sebelum mendengar rayuan itu, defendan telah membangkitkan suatu bantahan permulaan di atas perkara undang-undang, atas alasan bahawa plaintif pertama tidak berupaya mengambil khidmat seorang peguambela dan peguamcara untuk mewakilinya di dalam tindakan itu melainkan kebenaran terlebih dahulu dari Pegawai Pemegang Harta untuk berbuat demikian diperolehi mengikut s 38(1)(a) Akta Kebankrapan 1967 ('Akta itu'). Plaintif membantah atas alasan bahawa bantahan permulaan defendan dibangkitkan pada peringkat yang lewat kerana ia sepatutnya dibuat di hadapan timbalan pendaftar semasa perbicaraan permohonan defendan pada mulanya. Plaintif juga mengatakan bahawa dengan perintah mahkamah bertarikh 9 Januari 1995, perintah-perintah penerimaan dan penghukuman yang dibuat ke atas plaintif pertama dalam kebankrapannya telah dibatalkan dan dimansuhkan dan dia,

A hujah peguambela, kini boleh mengekalkan tindakan ini kerana ketidaklayakannya kini telah diketepikan mengikut s 36(2) Akta itu.

**Diputuskan**, membenarkan bantahan permulaan itu:

(1) Dari pliding, kausa tindakan itu melibatkan satu pengataan keingkaran kontrak oleh defendan dan sudah terakru sebelum plaintif menjadi bankrap. Oleh itu, kausa tindakan terletakhak pada Pegawai Pemegang Harta selepas penghukuman plaintif. Maka, s 38(1)(a) Akta itu terpakai kepada plaintif. Dalam keadaan itu, melainkan kebenaran terlebih dahulu dari Pegawai Pemegang Harta diperolehi untuk membawa tindakannya, plaintif tidak kompeten untuk berbuat demikian dalam namanya sendiri. Jika beliau tidak kompeten sedemikian, beliau juga tidak kompeten mengambil khidmat peguambela dan peguamcara untuk bertindak bagi pihaknya tanpa kebenaran terlebih dahulu dari Pegawai Pemegang Harta (lihat ms 275D–F; *Re Khoo Kim Hock* [1974] 2 MLJ 29 diikut; *Bailey v Thurston & Co Ltd* [1903] 1 KB 137 dibeza).

(2) Walaupun prosiding ini adalah secara rayuan, tetapi sebagai suatu rayuan mengikut A 56 Kaedah-Kaedah Mahkamah Tinggi 1980, ia merupakan satu perbicaraan semula. Batasan tunggal adalah mengenai pengenalan keterangan baru secara umumnya. Maka, bantahan permulaan itu, yang merupakan isu perkara undang-undang, boleh dibangkitkan pada bila-bila masa pada mana-mana peringkat prosiding itu (lihat ms 275G–H).

(3) Seksyen 36(2) Akta itu adalah berkenaan dengan pengetepian ketidaklayakan yang terkandung di dalam s 36(1) dan bukan secara umumnya. Pengetepian ketidakupayaan plaintif pertama oleh perintah mahkamah bertarikh 9 Januari 1995 tidak akan menyebabkan tindakan plaintif pertama itu, yang dimulakan semasa tempoh ketidakupayaannya dan sebelum pemberian perintah itu oleh mahkamah, menjadi kompeten tanpa mematuhi peruntukan-peruntukan s 38(1)(a) Akta itu. Maka, semasa waktu ketidakupayaannya, plaintif pertama tidak kompeten untuk mengambil khidmat peguam untuk mewakilinya (lihat ms 277H–I, 278D–E; *Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3 dan *Ingall v Moran* [1944] KB 160 diikut).]

**Notes**

For cases on the capacity of a bankrupt, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1277–1283.

For cases on appeal from registrar, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 275–279.

**Cases referred to**

*Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3
*Bailey v Thurston & Co Ltd* [1903] 1 KB 137

*Beckham v Drake* 2 HLC 579
*Britt v Buckinghamshire County Council* [1964] 1 QB 77
*Chandler v DPP* [1964] AC 763
*Ingall v Moran* [1944] KB 160
*Khoo Kim Hock, Re* [1974] 2 MLJ 29
*Torkington v Magee* [1902] 2 KB 427
*Wilson, ex p Vine, Re* (1878) 8 Ch D 364

**Legislation referred to**

Bankruptcy Act 1967 s 24(4), 36(1), (2), 38(1)(a), 92(1), 105(1)
Rules of the High Court 1980 O 56

*Ernest Chua* (*Ernest Chua & Co*) for the first plaintiff.
*Chong Siew Chiang* (*Grace Tan* with him) (*Chong Brothers*) for the defendant.

*Cur Adv Vult*

**Abdul Kadir Sulaiman J**: The first plaintiff appealed to the judge in chambers against the decision of the learned deputy registrar in striking out his writ of summons issued against the defendant with costs. The learned deputy registrar made her decision which arose out of the defendant's summons in chambers filed on 15 October 1993 in encl 12 on the grounds that the first plaintiff being an undischarged bankrupt had no locus standi to commence and/or maintain the action in his name as he had not obtained the prior sanction of the Official Assignee to do so. However, before hearing the appeal, the defendant raised a preliminary objection on a point of law. Learned counsel for the defendant contends that the first plaintiff is disabled from employing an advocate and solicitor to represent him in the action unless a prior sanction of the Official Assignee to do so is first obtained. In this action, the first plaintiff engaged Mr Ernest Chua of Messrs Ernest Chua & Co to represent him. This judgment is in relation to that preliminary objection raised.

Learned counsel for the defendant cited the case of *Re Khoo Kim Hock* [1974] 2 MLJ 29 in support of his contention. In that case, a counsel brought an application under ss 92(1) and 105(1) of the Bankruptcy Act 1967 ('the Act') on behalf of an undischarged bankrupt to have the adjudication order made against him annulled. When the application came up for hearing, counsel for the Official Assignee raised a preliminary objection on a point of law contending that having regard to the provisions of the Act an undischarged bankrupt in this country was disabled not only from maintaining the present application but also from employing an advocate and solicitor unless the prior sanction of the Official Assignee was first obtained. The learned judge referred to s 38(1) of the Act and held that the section does not apply to an application under ss 92(1) and 105(1) where the applicant is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the Official Assignee is necessary. However, it was also held in the case that an undischarged bankrupt in this country is entitled to engage an

advocate and solicitor to represent him in any action where the provision of s 38(1)(a) does not apply, or where the cause of action does not vest in the Official Assignee. So, it is clear from the decision in that case that the issues of the employment of advocate and solicitor and the maintaining of any action by an undischarged bankrupt are interrelated. It is so because, by s 24(4) of the Act, when a debtor is adjudged bankrupt his property is vested in the Official Assignee. Therefore, anything to be done in relation to the property of a bankrupt generally must be with the sanction of the Official Assignee. It follows from the above cited case also that an undischarged bankrupt is not entitled to employ an advocate and solicitor without the prior sanction of the Official Assignee in cases where s 38(1)(a) of the Act applies to him.

Section 38(1)(a) of the Act states:

> Where a bankrupt has not obtained his discharge —
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee ...

In our present case, the action by the first plaintiff involves an allegation of breach of contract by the defendant. It is not, therefore, an action in respect of an injury to his person. Furthermore, from the pleadings the cause of action accrued before his bankruptcy and therefore the cause of action vested on the Official Assignee upon adjudication. Hence, s 38(1)(a) of the Act applies to him. In the circumstances, unless the prior sanction of the Official Assignee is obtained to maintain his action, he is incompetent to do so in his own name, based on the above cited case, to which I concur. If so incompetent, he is also incompetent to employ an advocate and solicitor to act on his behalf without the prior sanction of the Official Assignee.

Learned counsel for the first plaintiff objected on the ground that this preliminary objection of the defendant was raised at such a late stage. It ought to have been made when the matter was before the learned deputy registrar when hearing the application of the defendant at first instance. The matter before the court today is pursuant to the notice of appeal over her decision given on 3 March 1994. I do not consider this to be a good ground because even though the proceedings before me now is by way of appeal from the decision of the learned deputy registrar, but being an appeal pursuant to O 56 of the Rules of the High Court 1980, it is by way of rehearing. The only limitation is as to the introduction of fresh evidence generally. However, I would not consider this preliminary objection on a point of law raised by the defendant as being one of introducing any fresh evidence. Being a point of law, it could be raised at any time in the course of any proceedings.

In his submission, learned counsel for the plaintiff informed the court that apart from *Khoo Kim Hock*, he could not find any other local decision on the strict interpretation of the letter and spirit of s 38(1) of the Act. He argues that s 38(1)(a) of the Act has no application in this case because according to the marginal note the section concerns consequences

of refusal of discharge. Whilst in this case, the question of refusal or otherwise of discharge of the first plaintiff is not in issue. I do not think I can agree. The marginal note found printed at the side of sections in an Act may sometimes be used but merely as an aid to construction. But they are not really part of the statute. They cannot restrict the wide and clear words of the section (see *Chandler v DPP* [1964] AC 763). Sometimes a marginal note will in any case be inaccurate and as stated in *Britt v Buckinghamshire County Council* [1964] 1 QB 77, 'on its own merits of no assistance whatever'. In this case, the wordings of s 38(1)(a) is clear that an undischarged bankrupt is incompetent to maintain any action otherwise than an action for damages for personal injury, except with the prior sanction of the Official Assignee. The first plaintiff's action here is in contract as opposed to that kind of tortiuous liability. There is in fact para 4 of the affidavit in opposition of the plaintiff which states that prior to the giving of his consent in writing to him to commence and maintain this action, the Assistant Official Assignee in Kuching, Mr Kho Fui Loong had verbally informed him to go ahead with the filing of the suit against the defendant as he needed time to communicate with the Official Assignee in Kuala Lumpur. However, without having to decide now whether that oral sanction would suffice, the issue before the court now is in regard to the sanction to engage or employ an advocate and solicitor to represent him which is not covered by that oral sanction. There is, therefore, no evidence that at least an oral sanction of the Official Assignee was obtained in regard to representation by an advocate and solicitor in the action. Falling back on the dicta in *Khoo Kim Hock*, his case being one covered by s 38(1)(a) of the Act, the plaintiff cannot be represented unless a prior sanction of the Official Assignee is obtained for that purpose. Learned counsel cited *Torkington v Magee* [1902] 2 KB 427 on the interpretation of a legal chose in action, and said that the right in the plaintiff to sue is not property. I see that the case cited has no relevance when dealing with the clear provisions of s 38(1)(a) of the Act. In any event, the Act defines property to include things in action. He next cited *Re Wilson, ex p Vine* (1878) 8 Ch D 364 by saying that an undischarged bankrupt retains a right to sue if it arose subsequent to his bankruptcy. There is no doubt about that but to do so, he is controlled by s 38 of the Act. But in this case the cause of action arose before his bankruptcy. So, again, I see no relevance in the case cited when dealing with the case before me now. Finally, learned counsel cited *Bailey v Thurston & Co Ltd* [1903] 1 KB 137. According to the headnote, an undischarged bankrupt, employed as traveller for a firm under a contract made before the commencement of the bankruptcy, can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the bankruptcy, the trustee in bankruptcy not having intervened in the action. In the action, the defendant pleaded that the plaintiff was adjudicated bankrupt before the action was brought, and was an undischarged bankrupt when it was brought, and that the trustee was not a party to the action, and that, in consequence, the action was not maintainable. But the court disagreed. This case can easily be distinguished on the facts because there the breach of contract occurred after the

A bankruptcy whereas in this present case the alleged breach occurred in 1985, well before the adjudication in 1990. At p 141, Collins MR has this to say:

> In case of the breach of such a contract as existed in the present case, complete at the date of the bankruptcy, and sounding in a money claim, there
B is no doubt that the right of action would pass to the trustee, and that he would be the proper person to sue.

This means that the damages obtained in the suit for breach which occurred before the bankruptcy would vest in the Official Assignee pursuant to s 24(4) of the Act and must, therefore, be subject to s 38(1)(a) of the
C Act.

Collins MR then cited a passage from the decision in *Beckham v Drake* 2 HLC 579, which is as follows:

> ... 'I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees, they cannot hire him out (as was said by
D Lord Mansfield), adopt and enforce a contract made before the bankruptcy, for the application of the personal skill or labour of a bankrupt, but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees.'

E His Lordship then went on to state:

> There is also a passage from the opinion of Parke B at p 625 of the report to the same effect: 'The contract, if unexecuted, would clearly not have passed to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed.' It may
F be observed that the contract under consideration in that case was very similar to that in the present case, for there was an agreement to employ the appellant for a term of years at a salary, and the action was for breach of that contract by dismissing the appellant before the expiration of the term. That breach, however, occurred before the bankruptcy, and the House of Lords held that the right of action for that breach passed to the assignee.

G Another interesting point brought out by learned counsel for the plaintiff in his submission is that now that by a court order dated 9 January 1995 which was produced during the course of the submission, the receiving and adjudication orders made upon the first plaintiff in his bankruptcy was respectively rescinded and annulled, can he now maintain the present
H action, as his disqualification is now removed pursuant to s 36(2) of the Act? In my opinion, it would not change the situation because the disqualification referred to in the section relates to the holding of certain offices which has nothing to do with the first plaintiff. Section 36(2), which concerns the removal of the disqualifications, is related to the disqualifications referred to in s 36(1) and not generally. Though now the
I receiving order and the adjudication order made against him have been rescinded and annulled, but what concerns us is his incapacity at the time the action was commenced which this preliminary objection of the defendant is all about. In *Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3, the defendant

was sued by the plaintiff in her capacity as an administratrix before the grant of the letters of administration was granted to her, though there was an order appointing her as such. It was held that as the plaintiff had not extracted the grant of letters of administration, she had no power to sue as administratrix and, therefore, the suit was a nullity and must be set aside. Lee Hun Hoe J (as he then was) cited *Ingall v Moran* [1944] KB 160, in delivering the judgment has this to say at p 4:

> On 17 September 1942, the plaintiff in *Ingall v Moran* [1944] KB 160 issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act 1934, claiming to sue in a representative capacity as administrator of his son's estate. But he did not take out letters of administration until nearly two months after the date of the writ. The county court judge applied the doctrine of 'relation back' and found for plaintiff. Allowing the appeal, the Court of Appeal held unanimously that the action was incompetent at the date of its inception by the issue of the writ and, that the doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration to the date of the intestate's death could not be invoked so as to render the action competent.

Similarly, in this case, I would hold that the removal of the incapacity of the first plaintiff by the court of 9 January 1995 would not render competent the action of the first plaintiff commenced during the period of his incapacity and before the grant of the order by the court, without compliance with the provisions of s 38(1)(a) of the Act. It follows, therefore, that without the prior sanction of the Official Assignee, during this period of incapacity, the first plaintiff is incompetent to engage an advocate and solicitor to represent him.

In the light of what has been said earlier, I find that there is merit in this preliminary objection of the defendant. I, therefore, hold that owing to his incapacity when instituting this action against the defendant, having regard to the provisions of the Act, for his failure to obtain the prior sanction of the Official Assignee, in whom his cause of action was vested, the first plaintiff is not competent to employ an advocate and solicitor to represent him in the action. The preliminary objection of the defendant on this issue is upheld. Unless the sanction of the Official Assignee is first obtained by the first plaintiff to employ an advocate and solicitor to represent him, his present appeal against the decision of the learned deputy registrar cannot proceed with Mr Ernest Chua representing him. To give the opportunity to the first plaintiff to take the necessary steps, this appeal is adjourned to a date to be fixed, as soon as possible, by the learned senior assistant registrar. Costs thrown away are awarded to the defendant in any event.

*Preliminary objection allowed.*

Reported by Sally Kee Seok Meng